

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-9633**

File: 21-477692; Reg: 16084143

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,  
dba CVS Pharmacy Store #9938  
3625 Mount Diablo Boulevard, Lafayette, CA 94549-3711,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 12, 2018  
South San Francisco, CA

**ISSUED JULY 27, 2018**

*Appearances:*      *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of  
Solomon, Saltsman & Jamieson, as counsel for Garfield Beach  
CVS, LLC and Longs Drug Stores California, LLC,

*Respondent:* Joseph Scoleri, III, as counsel for Department of  
Alcoholic Beverage Control.

**OPINION**

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing  
business as CVS Pharmacy Store #9938, appeal from a decision of the Department of  
Alcoholic Beverage Control<sup>1</sup> suspending their license for 10 days because their clerk  
sold an alcoholic beverage to a police minor decoy, in violation of Business and  
Professions Code section 25658, subdivision (a).

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<sup>1</sup>The decision of the Department, dated January 11, 2017, is set forth in the  
appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On May 5, 2016, the Department filed an accusation against appellants charging that, on February 25, 2016, appellants' clerk, Kimberly Talbert (the clerk), sold an alcoholic beverage to 17-year-old Joseph H. (the decoy). Although not noted in the accusation, the decoy was working as a minor decoy in a joint operation between the Lafayette Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 25, 2016, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Casey Tinloy.

Testimony established that on February 25, 2016, the decoy entered the licensed premises and selected a can of Bud Lite beer. He took the beer to the register and handed it to the clerk. The clerk asked for the decoy's identification and he handed her his California driver's license. The license showed his correct date of birth — showing him to be 17 years of age — and contained a red stripe indicating "AGE 21 IN 2020" as well as a blue stripe indicating that the license was provisional until age 18 in 2017. (Exh. 2B.)

The clerk looked at the ID for 5 to 10 seconds, then handed it back to the decoy. She completed the sale without asking any age-related questions. The decoy exited the premises. He later re-entered with Agent Tinloy and Lafayette Police Officer Ones to make a face-to-face identification of the clerk. The clerk was photographed (exh. 3A) and subsequently cited.

On November 2, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days.

Thereafter, on November 8, 2016, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision, stating that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On January 3, 2017, the Department adopted the proposed decision in its entirety, and on January 11, 2017, the Department issued its Certificate of Decision.

Appellants then filed a timely appeal contending that the ALJ's finding, that the decoy displayed the appearance generally expected of a person under the age of 21, is not supported by substantial evidence, in violation of rule 141(b)(2).<sup>2</sup>

### DISCUSSION

Appellants contend that the ALJ's finding, that the decoy displayed the appearance generally expected of a person under the age of 21, is not supported by substantial evidence — in violation of rules 141(b)(2) and 141(a). (AOB at pp. 5-10.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

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<sup>2</sup>References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) Appellants maintain the decoy's appearance did not comply with the rule.

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Appellants maintain that the facts in this case indicate unfairness in that the decoy appeared older than his true age of 17 — because of his height, his short hair style and his confident manner.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more

competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings of fact regarding the decoy's appearance and demeanor:

5. On February 25, 2016, the decoy was 6' 5" tall and weighed approximately 185 pounds. He wore a dark red or black colored t-shirt, a gray sweatshirt, blue jeans, and shoes. His blond hair was 1" to 2" long. His overall appearance at the hearing was basically the same, or very similar to, his appearance on the date of the decoy operation at Respondents' premises. On the date of the decoy operation, a photo was taken of him. (Exhibit 2A)

[¶ . . . ¶]

14. The decoy, Joseph H., appeared his actual age, 17, at the time of the

decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk that sold the decoy his beer, the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the sales clerk herein.

(Findings of Fact, ¶¶ 5-14.) Based on these findings, the ALJ addressed appellants' arguments regarding the decoy's appearance:

6. Respondents contended the 17 year old decoy did not meet the appearance standard set forth under Rule 141(b)(2) because the decoy testified he was confident in that he knew what to do as a decoy and was not nervous at Respondents' premises. Even if the decoy did not feel nervous about acting as a decoy in the Respondent's [sic] store, the decoy's state of mind does not constitute a defense to the accusation. Respondents did not prove how the decoy's mental state made him appear any older than his 17 years. The clerk never even made any statements on the date of the investigation she believed the decoy appeared at least 21 years old. Respondents' clerk did not testify at the hearing so as to establish her state of mind regarding the decoy's appearance to her on the day of the investigation. Respondents' argument the decoy looked too old is speculative and has no merit.

7. Contrary to Respondents' assertion, there was nothing so unusual about the decoy's hair length, color, or style that somehow made him appear any older than he was. He had 1"-2" long blond hair that possibly had a hair gel product in it and partially swept to one side. That did not make him look any older than he was. Further, there was also nothing about the type, style, color, or feature of his clothing that made him appear any older than he actually was. He simply wore a t-shirt, sweatshirt, jeans, and shoes. When all of the elements of the decoy's appearance are weighed together, including such added appearance factors as his demeanor, mannerisms, persona, and poise, the decoy's overall appearance met the appearance standard set forth in Rule 141(b)(2). (Finding of Fact ¶ 14.)

(Conclusions of Law, ¶¶ 6-7.)

Appellants argue "the ALJ only discusses aspects of appearance that are neutral at best – his hair and his clothes . . . [but fails to] address the crucial attributes that would tend to cause Joseph to appear older." (AOB at pp. 6-7.) They contend that the ALJ's failure to discuss the decoy's height or his confidence "calls into question whether

the ALJ considered those crucial factors at all when he concluded that the Department has used a decoy that met the standards set by rule 141(b)(2). (AOB at p. 9.)

We are not convinced that these so-called "omissions" amount to error. The ALJ noted the decoy's height, but apparently did not feel the need to discuss it. As the Board has stated time and again, the ALJ need not provide a "laundry list" of factors that he deemed inconsequential in making his assessment concerning the decoy's overall appearance. (See, e.g., *Lee* (2014) AB-9359 at p. 8; *7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) The decision reflects that the ALJ considered various indicia of age — including the decoy's physical appearance, dress, poise and demeanor at the hearing — and nevertheless found that the decoy's appearance satisfied the requirements of rule 141. We see no reason to upset that determination. As the Board has observed in the past:

An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as [rule 141(b)(2)] provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's [*sic*] are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) There is nothing in the record here to suggest the ALJ's determination was unreasonable, arbitrary, or capricious.

The Board has repeatedly declined to substitute its judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys who are tall, or who have short hair, or who appear confident, automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager"

but "the appearance which could generally be expected of a person under 21 years of age." In Finding of Fact paragraph 14, and Conclusions of Law paragraphs 6 and 7, the ALJ found that the decoy met this standard.

Appellants presented no *evidence* that the decoy's height, hair, or confidence *actually resulted* in him displaying an appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, but we do know that she requested and was furnished the decoy's identification, showing him to be 17 years of age, yet she made the sale anyway. Appellants rely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail.

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that he possess the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

The evidence presented at the hearing, including the presence of the decoy himself, clearly provided substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2), and we see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.



ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
MEGAN McGUINNESS, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup>This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

# APPENDIX

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION  
AGAINST:**

GARFIELD BEACH CVS, LLC  
LONGS DRUG STORES CALIFORNIA LLC  
CVS PHARMACY STORE #9938  
3625 MT. DIABLO BLVD  
LAFAYETTE, CA 94549-3711

CONCORD DISTRICT OFFICE

*AB-9633*

File: 21-477692}

Reg: 16084143

**CERTIFICATE OF DECISION**

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)

Under the Alcoholic Beverage Control Act

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on January 3, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after February 21, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: January 11, 2017



Matthew D. Botting  
General Counsel

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ABC APPEALS BOARD

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION AGAINST:**

Garfield Beach CVS LLC,  
Longs Drug Stores California, LLC  
Dbas: CVS Pharmacy Store #9938  
3625 Mt. Diablo Boulevard  
Lafayette, CA 94549-3711

Respondents

Regarding Their Off-Sale General License.

} File: 21-477692  
}  
} Reg.: 16084143  
}  
} License Type: 21  
}  
} Word Count: 15,820  
}  
} Reporter: Amber Emerick, CSR  
} Emerick and Finch Reporters  
}  
} **PROPOSED DECISION**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office,  
Department of Alcoholic Beverage Control, heard this matter in Martinez, California, on  
October 25, 2016.

Heather Hoganson, Attorney III, represented the Department of Alcoholic Beverage  
Control. (hereafter "the Department")

Saranya Kalai, Esq., of Solomon, Saltsman, and Jamieson, represented the co-licensees.  
(hereafter "Respondents")

The Department seeks to discipline the Respondents' license on the grounds that, on or  
about February 25, 2016, the Respondents, through their agent or employee, Kimberly  
Talbert, sold, furnished, or gave, or caused to be sold, furnished, or given, an alcoholic  
beverage to Joseph H., a person under the age of 21, in violation of California Business  
and Professions Code section 25658(a).<sup>1</sup> (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was  
received at the hearing. The matter was argued by the parties and submitted for decision  
on October 25, 2016.

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<sup>1</sup> All statutory references are to the California Business and Professions Code unless otherwise noted.  
Also, to help protect the juvenile decoy's privacy, his last name was omitted from the pleadings and not  
referred to in the hearing.

### FINDINGS OF FACT

1. The Department filed the accusation on May 5, 2016. (Exhibit 1)
2. The Department issued Respondents a Type-21 Off-Sale General license for the above-described location on June 22, 2009.<sup>2</sup>
3. There is no record of any prior departmental discipline against Respondents under this license since it was issued.
4. Joseph H. (hereafter "the decoy") was born on February 5, 1999. On February 25, 2016, he was 17 years old and served as a minor decoy for law enforcement.
5. On February 25, 2016, the decoy was 6'5" tall and weighed approximately 185 pounds. He wore a dark red or black colored t-shirt, a gray sweatshirt, blue jeans, and shoes. His blonde hair was 1" to 2" long. His overall appearance at the hearing was basically the same, or very similar to, his appearance on the date of the decoy operation at Respondents' premises. On the date of the decoy operation, a photo was taken of him. (Exhibit 2A)
6. On February 25, 2016, the 17 year old decoy entered Respondents' store at 3625 Mt. Diablo Boulevard, Lafayette, California and selected a single can of Bud Lite beer to purchase. He carried the beer to the sales counter and gave it to Respondents' sales clerk, Kimberly Talbert.<sup>3</sup> (hereafter "the clerk")
7. The clerk asked the decoy for his identification. The decoy took his identification from his wallet and gave it to her. (Exhibit 2B) The clerk held and inspected the identification for 5-10 seconds and returned it to the decoy. The identification had a red stripe on it indicating the holder would be "Age 21 in 2020". It also had a blue strip on it stating that it was provisional until age 18 in 2017. (Exhibit 2B) The clerk did not ask the decoy any questions regarding his age or about his identification.
8. After the clerk returned the decoy's identification to him, she rang up the sale and told the decoy the price for the beer. The decoy paid the clerk for the beer.

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<sup>2</sup> A Type-21 license permits the holder to retail in beer, wine, and distilled spirits for off premises consumption.

<sup>3</sup> ABC Agent Casey Tinloy and Joseph H., the decoy, both testified at the hearing. Respondent called no witnesses.

9. The decoy exited the store with his can of beer and met ABC Agent Casey Tinloy (hereafter "Agent Tinloy") and Officer Ones at their car parked about 25 yards from the entrance to Respondent's store. The decoy told Agent Tinloy and Officer Ones that he purchased beer at the premises. The trio then re-entered the store.<sup>4</sup>

10. Once in the store, Agent Tinloy identified himself to the clerk as a peace officer. He asked her to move a few feet down the sales counter closer to the decoy and directed the clerk to pay attention. Agent Tinloy then asked the decoy who sold him his beer. The decoy pointed to the clerk and verbally identified her as the seller as they faced each other and were about 5 feet apart. Agent Tinloy immediately told the clerk the decoy had just identified her as the one who had sold beer to him. The clerk appeared upset and surprised. After the face-to-face identification occurred, Officer Ones escorted the decoy outside the store.

11. Agent Tinloy and the clerk went into a back room area in the store. Once in that room, the clerk told Agent Tinloy she made a mistake and misread the birth year on the decoy's identification as 1989, not 1999. After Agent Tinloy determined the clerk had no outstanding warrants, he issued her a citation for selling an alcoholic beverage to a minor. The clerk was also photographed. (Exhibit 3A)

12. February 25, 2016 was the first and only date Joseph H. acted as a police decoy. He was a citizen volunteer and had neither previous law enforcement experience nor other ties to law enforcement, such as being a police explorer or cadet.

13. On February 25, 2016 the decoy visited a total of six licensed premises. He purchased an alcoholic beverage at two of those six businesses. Respondents' premises was one of the later ones he visited. When Joseph H. acted as a decoy at Respondents' premises, he felt less nervous than when he was at other licensed premises he visited earlier that day.

14. The decoy, Joseph H., appeared his actual age, 17, at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk that sold the decoy his beer, the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the sales clerk herein.

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<sup>4</sup> There was another decoy, "Justin", who was operating with this team. However, Justin never entered Respondent's store at any time and played no role in Joseph H.'s purchase of beer at Respondents' store.

### CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Business and Professions Code Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Business and Professions Code Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Under California Code of Regulations, Title 4, Division 1, Article 22, section 141,
  - (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.
  - (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:
    - (1) At the time of the operation, the decoy shall be less than 20 years of age;
    - (2) The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense;
    - (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;
    - (4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

5. Cause for suspension or revocation of Respondents' license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on February 25, 2016, Respondents' employee, agent or sales clerk, Kimberly Talbert, inside the Licensed Premises, sold beer, an alcoholic beverage, to Joseph H., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)

6. Respondents contended the 17 year old decoy did not meet the appearance standard set forth under Rule 141(b)(2) because the decoy testified he was confident in that he knew what to do as a decoy and was not nervous at Respondents' premises. Even if the decoy did not feel nervous about acting as a decoy in the Respondent's store, the decoy's state of mind does not constitute a defense to the accusation. Respondents did not prove how the decoy's mental state made him appear any older than his 17 years. The clerk never even made any statements on the date of the investigation she believed the decoy appeared at least 21 years old. Respondents' clerk did not testify at the hearing so as to establish her state of mind regarding the decoy's appearance to her on the day of the investigation. Respondents' argument the decoy looked too old is speculative and has no merit.

7. Contrary to Respondents' assertion, there was nothing so unusual about the decoy's hair length, color, or style that somehow made him appear any older than he was. He had 1"-2" long blond hair that possibly had a hair gel product in it and partially swept to one side. That did not make him look any older than he was. Further, there was also nothing about the type, style, color, or feature of his clothing that made him appear any older than he actually was. He simply wore a t-shirt, sweatshirt, jeans, and shoes. When all of the elements of the decoy's appearance are weighed together, including such added appearance factors as his demeanor, mannerisms, persona, and poise, the decoy's overall appearance met the appearance standard set forth in Rule 141(b)(2). (Finding of Fact ¶ 14)



8. Respondents argued the decoy did not make an appropriate face-to-face identification of the clerk as required by Rule 141(b)(5). That contention has no merit. Rather, the face-to-face identification was carried out in a fair manner where the clerk knew or certainly should have known she had been identified by the decoy as the person who sold beer to him. After entering the store, Agent Tinloy identified himself to the clerk as a peace officer and directed the clerk to pay attention. Agent Tinloy then asked the decoy, in the immediate presence of the clerk, to identify who sold him the beer. The decoy pointed to and verbally identified clerk Kimberly Talbert. Agent Tinloy promptly verbally confirmed to the clerk that the decoy had just identified her as the one who sold him beer. The clerk immediately appeared upset and surprised and that evidenced she knew what had just occurred. The clerk did not deny she had sold beer to the decoy. Rather, a few moments later, when Agent Tinloy was in the back room with the clerk, she told him she made a mistake and misread the date of birth on the decoy's identification. Lastly, the clerk did not testify at the hearing so as to provide her own sworn version of what occurred or what she thought that day. Under these set of circumstances, the face-to-face identification was carried out in a completely fair fashion in full compliance with Rule 141(b)(5).

9. In this instance, the clerk did ask for and inspect the decoy's identification that plainly stated he would not be 21 until the year 2020. The clerk had all of the information she needed to rightfully deny the sale of beer to the decoy. At no point whatsoever during the course of the investigation did the clerk deny to Agent Tinloy or Officer Ones that she sold beer to the decoy.<sup>5</sup>

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions the parties raised in the pleadings or elsewhere lack merit.

### **PENALTY**

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as Rule 144. Under that rule, the presumptive penalty for giving, furnishing, or selling an alcoholic beverage to a minor with no prior sale-to-minor violations within 36 months of the current violation is a 15 day license suspension. However, the rule also permits imposition of a different penalty based on the presence of aggravating or mitigating factors.

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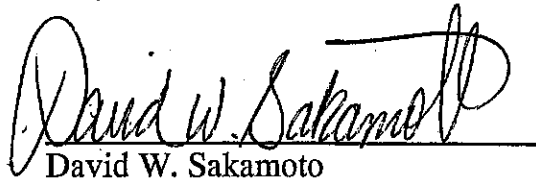
<sup>5</sup> In the store's back room, the clerk conveyed to Agent Tinloy she simply misread the year of birth on the identification. The Respondents made a hearsay objection and the Department argued the statement was admissible to show the clerk realized she had been identified by the decoy as the one who sold him beer. The clerk's statement was admitted as administrative hearsay for that latter purpose. This Decision does not make any factual finding as to whether or not the clerk, in fact, misread the identification as she claimed.

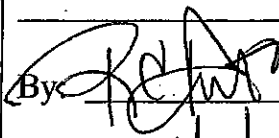
2. Under Rule 144, the length of licensure at the premises without prior discipline or problems is a factor in mitigation. In this instance, Respondents have been licensed since 2009 with no prior disciplinary history. Acknowledging this factor, the Department recommended a mitigated penalty of a 10 day license suspension. Respondents asserted a 5 day suspension, with all 5 days stayed, was a more appropriate penalty if the accusation were sustained, but pointed out no additional factor in mitigation beyond the absence of prior disciplinary history since the license was issued in 2009. In assessing and weighing the mitigating factor present in this case, the penalty recommendation below reflects an appropriate measure of downward adjustment from the presumptive penalty set forth in Rule 144.

**ORDER**

Respondents' off-sale general license is hereby suspended for 10 days.

Dated: November 2, 2016

  
David W. Sakamoto  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>11/3/17</u>